Supreme Court, U.S.
FILED
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No. 94-1491

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

BARTHOLOMEW BANKS,

Respondent.

WAYNE COUNTY PROSECUTOR
Attorney for Petitioner

RONALD E. STEINBERG (P-31380)
STATE APPELLATE DEFENDER OFFICE
Attorney for Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

By: RONALD E. STEINBERG (P-31380)
Attorney for Respondent
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QUESTIONS PRESENTED

A. DOES THIS COURT HAVE JURISDICTION TO REVIEW THE DECISION OF THE MICHIGAN COURT OF APPEALS?

B. DID THE MICHIGAN COURT OF APPEALS ERR BY HOLDING THAT THE POLICE ILLEGALLY SEIZED RESPONDENT WHEN THEY ARRESTED HIM WITHOUT A WARRANT BECAUSE THE FACTS KNOWN TO THE ARRESTING OFFICERS AT THE TIME OF THE ARREST DID NOT ESTABLISH PROBABLE CAUSE TO ARREST?

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED

INDEX OF AUTHORITIES i

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

A. THE DECISION OF THE MICHIGAN COURT OF APPEALS WAS BASED ON INDEPENDENT STATE GROUNDS 4

B. THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT THE STATEMENT THE POLICE OBTAINED FROM RESPONDENT AFTER PROLONGED CUSTODIAL INTERROGATION WAS THE FRUIT OF AN ILLEGAL ARREST 6

INDEX OF AUTHORITIES

Arizona v Evans, _____ US _____ (63 USLW 4179, rel 03/01/95) 4

Michigan v Long, 463 US 1032; 103 SCt 3469; 77 LEd2d 1201 (1983) 4

People v Arterberry, 431 Mich 381; 429 NW2d 574 (1988) 4

People v Bloyd, 416 Mich 538; 331 NW2d 447 (1982) . . 9

People v Casey, 411 Mich 179; 305 NW2d 247 (1981) . . 9

People v Mallory, 421 Mich 229; 365 NW2d 673 (1984) . 9

People v Oliver, 417 Mich 366; 338 NW2d 167 (1983) . . 5

People v Westra, 445 Mich 284; 517 NW2d 734 (1994) . . 5

Scott v United States, 436 US 128; 98 SCt 1717; 56 LEd2d 168 (1978) 4,6,7,8,9

Taylor v Alabama, 457 US 687; 102 SCt 2664; 73 LEd2d 314 (1982) 4

OTHER AUTHORITIES

MCL 764.15(1)(e); MSA 28.874(1)(3) 5

Constitution 1963 5

United States Constitution 4

COUNTER-STATEMENT OF THE CASE

Respondent was convicted in a Michigan court, *inter alia*, of first degree murder and sentenced to life without parole. He appealed by right. In an unpublished *per curiam* opinion dated September 12, 1994, the Michigan Court of Appeals reversed his convictions and remanded the case for a new trial. Petitioner applied to the Michigan Supreme Court for review by filing a delayed application for leave to appeal. The Michigan Supreme Court denied Petitioner's delayed application by order dated January 24, 1995.

Prior to trial, Respondent sought suppression of an extra-judicial statement he made while in police custody on grounds that it was the fruit of an illegal arrest and police coercion. Testimony taken at a pre-trial evidentiary hearing established that Respondent was arrested without a warrant, and without a colorable claim of probable cause to arrest. Police held him for fifteen hours, interrogating him on and off over the last seven of those hours, before extracting an inculpatory statement.

Although the trial judge found that the facts known to the police at the time of the arrest did not provide them with probable cause to arrest, he ruled that suppression was not required. He reasoned that the existence of an outstanding warrant, which the arresting officers were not aware of until after the inculpatory statement had been obtained, would have given the officers probable cause to arrest.

On Respondent's appeal of right, appointed appellate counsel challenged the statement on grounds that it was the fruit of an illegal arrest. Appellate counsel was replaced after a dispute arose with Respondent over whether a claim of ineffective assistance of counsel should be pursued. Substitute appellate counsel conducted an evidentiary hearing in the trial court on a claim of ineffective assistance of counsel. Substitute appellate counsel subsequently submitted a supplemental brief raising several additional claims of error; that Respondent did not receive the effective assistance of counsel at trial, that the statement was the fruit of police coercion, and that the trial judge failed to instruct the jury on reasonable doubt.

The Michigan Court of Appeals decided Respondent's appeal in an unpublished *per curiam* opinion dated September 12, 1994. The Court ruled that the trial judge's decision to admit the disputed statement was clearly erroneous because the statement was the fruit of an illegal arrest. Starting with the rule that a determination as to the legality of a warrantless arrest must be based on the information known to the police at the time of the arrest, the Court held that the arrest was unlawful because the facts known to the arresting officers, viewed objectively, did not establish probable cause to arrest. The Court did not consider the merits of any of the claims raised in the supplemental brief because the relief ordered rendered those claims moot.

Petitioner sought review from the Michigan Supreme Court by filing a delayed application for leave to appeal. That application was denied by order dated January 24, 1995.

REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE MICHIGAN COURT OF APPEALS WAS BASED ON INDEPENDENT STATE GROUNDS.

State courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution. Michigan v Long, 463 US 1032; 103 SCt 3469; 77 LEd2d 1201 (1983). This Court does not have jurisdiction to review state court decisions based on adequate and independent state grounds. Adequate and independent state grounds do not exist when the decision appears to rest primarily on federal law or appears to be interwoven with the federal law. Michigan v Long, supra; Arizona v Evans, _____ US _____ (63 USLW 4179, rel 03/01/95).

In the case at bar, the Michigan Court of Appeals did not expressly refer to, let alone rely on, either the Fourth Amendment or any other provision of the United States Constitution. The only two federal cases cited, Scott v United States, 436 US 128; 98 SCt 1717; 56 LEd2d 168 (1978) and Taylor v Alabama, 457 US 687; 102 SCt 2664; 73 LEd2d 314 (1982), were mentioned in the context of a discussion of the trial judge's ruling. The Michigan Supreme Court quoted language from Scott in People v Arterberry, 431 Mich 381; 429 NW2d 574 (1988), and the trial judge relied on that language when ruling against Respondent. The Michigan Court of Appeals found that Scott did not support the trial judge's ruling. The only other authority the Michigan Court of Appeals relied on was a Michigan

statute and two Michigan Supreme Court decisions. The statute, MCL 764.15(1)(e); MSA 28.874(1)(e),[1] provides that a police officer may make a warrantless arrest, *inter alia*, when that officer has knowledge that another officer has an arrest warrant. One of the two Michigan Supreme Court decisions, People v Oliver, 417 Mich 366; 338 NW2d 167 (1983) was expressly based on the Michigan Constitution. The other, People v Westra, 445 Mich 284; 517 NW2d 734 (1994) was a short opinion adopting a dissenting opinion from the Michigan Court of Appeals. The essence of that opinion was that probable cause to arrest must be based on information known to the arresting officers at the time of the arrest.

Because the Michigan Court of Appeals based its decision on independent state grounds, the petition for a writ of certiorari should be denied.

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[1]The statute provides:

> (1) A peace officer may, without a warrant, arrest a person in the following situations:
>
> * * *
>
> (e) When the peace officer has received positive information by written, telegraphic, teletypic, telephonic, radio, or other authoritative source that another peace officer holds a warrant for the arrest.

B. **THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT THE STATEMENT THE POLICE OBTAINED FROM RESPONDENT AFTER PROLONGED CUSTODIAL INTERROGATION WAS THE FRUIT OF AN ILLEGAL ARREST.**

In Scott v United States, supra, this Court held that the test for determining whether a warrantless arrest was lawful is whether the facts known to the arresting officer at the time of the arrest, viewed objectively, establish probable cause to arrest. Based on this test, the Michigan Court of Appeals correctly held that the statement the police obtained from Respondent during the course of a lengthy custodial interrogation was the fruit of an illegal arrest.

The seizure of Respondent was a willful act of police misconduct. Without a colorable claim of reasonable suspicion, let alone probable cause to arrest, police arrested Respondent, held him for eight hours, and then interrogated him off and on for another seven hours. The relevant facts, which were not seriously in dispute at the pre-trial suppression hearing, establish that police investigating a shooting learned that the individual who appeared to be the intended victim had recently had problems with two of Respondent's nephews, Darrell Banks and Donnell Banks. The morning after the shooting, officers observed Respondent, Donnell Banks, and another individual in an automobile. They proceeded to arrest both Respondent and Donnell Banks without a warrant. Although the officers asserted that they believed they had probable

cause to arrest Donnell Banks, they did not make a similar assertion with respect to Respondent.

After holding Respondent in custody for approximately eight hours, the police began interrogating him. The interrogation, which continued on and off for approximately seven hours, ended after Respondent made inculpatory admissions.

The conduct of the arresting officers demonstrates a knowing and intentional violation of Respondent's constitutional rights. In a raw exercise of police power, they made a warrantless arrest without even a colorable claim of probable cause to arrest. They confined Respondent, kept him isolated for eight hours, and interrogated him in hopes that he would provide them with some useful information.

The trial judge found that the information available to the police at the time of the arrest did not establish probable cause to arrest. He held that suppression was not required because subsequently discovered information, the existence of an outstanding warrant, would have given the police probable cause to arrest. The Michigan Court of Appeals reversed, holding that the legality of a warrantless arrest must be determined on the basis of the information known to the arresting officers.

Petitioner argues that the Michigan Court of Appeals has misinterpreted this Court's holding in Scott v United States, supra. Petitioner's argument is without merit. The holding of the Michigan Court of Appeals is wholly consistent with this Court's holding in Scott.

In Scott, this Court established an objective test for determining whether a warrantless arrest was proper. The reviewing court must determine whether the facts known to the arresting officer, viewed objectively, establish probable cause to arrest. If they do, the arrest is proper regardless of the arresting officer's subjective intent. Conversely, if the facts known to the arresting officer do not establish probable cause to arrest, the arrest is improper. Here, the facts known to the arresting officer did not establish probable cause to arrest. The finding of the Michigan Court of Appeals that after-acquired information could not retroactively provide probable cause to arrest is entirely consistent with this Court's holding in Scott.

Petitioner asserts that certiorari should be granted because this case presents an issue of importance to the jurisprudence of this country. The decision of the Michigan Court of Appeals at issue here is an unpublished opinion. As such, it has no precedential value in the State of Michigan,[2] let alone any other jurisdiction.

Petitioner asserts that other courts and commentators have misinterpreted the Scott decision, but has not provided any support for this assertion. In all four of the cases cited by Petitioner, the reviewing court ultimately found that the arrest was proper because the objective facts known to the arresting officers at the time of the arrest established probable cause to arrest. The only commentary which Petitioner has cited is a brief footnote in a

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[2]MCR 7.215(C)(1).

legal treatise. The quoted language is entirely consistent with this Court's holding in Scott.

Petitioner asserts that the arresting officers cannot be said to have been acting in "bad faith," but also has not offered any explanation as to how police officers who make a warrantless arrest without even a colorable claim of probable cause to arrest can be said to be acting in good faith. Action made without even a colorable claim of legal justification can only be characterized as being done in "bad faith".[3]

Because Petitioner has failed to establish a substantial need for review by this Court, the Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

STATE APPELLATE DEFENDER OFFICE

Dated: April 7, 1995

BY: Ronald E. Steinberg

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Of the Michigan Bar

[3]The Detroit Police Department has a history of violating the prohibition against arrest and detention not based on probable cause. In People v Casey, 411 Mich 179; 305 NW2d 247 (1981), the Michigan Supreme Court expressly repudiated the practice of using reverse writs to detain citizens. A reverse writ was judicial approval of a brief detention under the circumstances where there was not probable cause to arrest. See also People v Mallory, 421 Mich 229; 365 NW2d 673 (1984); People v Bloyd, 416 Mich 538; 331 NW2d 447 (1982).

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WAYNE COUNTY PROSECUTOR
Attorney for Petitioner

RONALD E. STEINBERG (P31380)
STATE APPELLATE DEFENDER OFFICE
Attorney for Respondent

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WASHTENAW)

DONNA M. MOSES, being first duly sworn, deposes and says that on April 7, 1995, she mailed one copy of Respondent's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AFFIDAVITS in support of Motion, and RESPONSE TO PETITION FOR A WRIT OF CERTIORARI ** to:

Timothy Baughman
Wayne County Prosecutor
1441 St. Antoine
Detroit, MI 48226

Gay Secor Hardy
Office of the Attorney General
720 Law Bldg., 535 W. Ottawa
Lansing, MI 48913

by placing said documents in envelopes addressed as indicated above and placing same in the United States mail in Ann Arbor, Michigan, first class postage fully pre-paid thereon.

Donna M. Moses

DONNA M. MOSES

Sworn and subscribed to before me
on April 7, 1995

Richard B. Ginsberg, Notary Public
Washtenaw County, Michigan
My Commission Expires: 08/26/96

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April 7, 1995

Clerk
Supreme Court of the United States
Washington, DC 20543

Re: People of the State of Michigan
v Bartholomew Banks
USSC No. 94-1491

Dear Clerk:

Enclosed please find ten copies of Respondent's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, with supporting documentation, and RESPONSE TO PETITION FOR WRIT OF CERTIORARI and PROOF OF SERVICE.

Thank you very much.

Sincerely yours,

STATE APPELLATE DEFENDER OFFICE

Ronald E. Steinberg
Attorney for Respondent

RES/dmm
Enclosures